No. 1125

In the Supreme Court of the United States

OCTOBER TERM, 1941

STANDARD OIL COMPANY OF CALIFORNIA, APPELLANT

v.

CHARLES G. JOHNSON, AS TREASURER OF THE STATE OF CALIFORNIA

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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The United States presents this brief as amicus curiae because it is vitally interested in the question which the parties seek to raise, namely, whether an army post exchange is a Federal instrumentality, and is anxious to have the question litigated only in a controversy in which the issue is properly raised. We think that this Court has no jurisdiction under Section 237 (a) of the Judicial Code to consider the issue upon appeal, and that the record does not present a Federal ques-

tion which could support a writ of certiorari under Section 237 (b).

1. *Preliminary.*—This case arose in the California courts as a suit for refund of gasoline taxes which the Standard Oil Company of California brought against the State Treasurer. The taxes had been paid by the Oil Company to the State with respect to gasoline which it had sold to several United States Army Post Exchanges, none of which is located on territory subject to the exclusive jurisdiction of the United States.

The taxes were imposed by the California Motor Vehicle Fuel License Tax Act (Cal. Stats. 1923, p. 571, as amended by Cal. Stats. 1925, p. 659; Cal. Stats. 1927, p. 1308; Cal. Stats. 1929, pp. 112, 1551; Cal. Stats. 1931, pp. 105, 1652, 2001, 2288; Cal. Stats. 1933, pp. 1249, 1631; Cal. Stats. 1935, pp. 1646, 1692, 1717, 1760; Cal. Stats. 1937, p. 2217; Cal. Stats. 1939, pp. 1714, 2222), which provides in part as follows:

> SEC. 3. A license tax is hereby imposed for the privilege of distributing, within the meaning of section 7 of this act, any motor vehicle fuel. Said license tax shall be according to or measured by the gallonage of motor vehicle fuel so distributed in this State and shall be at the rate of three cents for each gallon of such fuel refined, manufactured, produced, blended or compounded by such distributor in this State and so distributed by him in this State, or imported by such distributor into and so distributed

> by him in this State otherwise than in the original package or container[1] * * *.

The Oil Company sought refund on two main grounds: (1) that the taxes were invalid under the Federal Constitution since they were imposed with respect to sales to Federal instrumentalities; (2) that, in any event, the sales in question were exempt under Section 10 of the California Act which provides:

> SEC. 10. The provisions of this act requiring the payment of license taxes shall not be held or construed to apply * * * to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government, * * *.

(a) As to the first ground, it is now clear that a state tax may be imposed upon a vendor[2] with

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[1] Section 7 of that Act provides (Cal. Stats. 1937, p. 2219):

"SEC. 7. For the purposes of this act all motor vehicle fuel sold, donated, consigned for sale, bartered or used shall be deemed to be distributed, and to insure the proper administration of this act and to prevent evasion of the license tax hereby imposed it shall be presumed that all motor vehicle fuel refined, manufactured, produced, blended or compounded in this State, or imported into this State, and no longer in the possession of the distributor, has been distributed unless the contrary is established; * * *.

"Nothing in this act shall be construed as requiring the payment of the license tax herein specified upon more than one sale, distribution or transfer of the same motor vehicle fuel."

[2] As shown by the quoted portions of Sections 3 and 7 and by Sections 1, 4, 5, 6, 8, and 9 of the California Motor Ve-

respect to sales to the United States. See *Alabama* v. *King & Boozer*, 314 U. S. 1, 9. To the extent that a different view once prevailed in such cases as *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, it seems to have been rejected in the *King & Boozer* decision. Accordingly, the Oil Company's attempt to avoid the tax on the ground that it is unconstitutional does not present a substantial Federal question.

(b) As to the second ground, it is clear that whatever exemption the Oil Company may claim is derived solely from the California statute. There is no Constitutional prohibition against a state tax upon the vendor with respect to sales to the United States or its instrumentalities. And so far as the

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hicle Fuel License Tax Act, the tax is imposed solely on the distributor—i. e., the vendor. This is clear from the Act and the California courts have so held. *People* v. *Ventura Refining Co.*, 204 Cal. 286, 294; *Standard Oil Co.* v. *Johnson*, 10 Cal. (2d) 758, 767–768; *Rio Grande Oil Co.* v. *Los Angeles*, 6 Cal. App. (2d) 200; cf. *Western L. Co.* v. *State Bd. of Equalization*, 11 Cal. (2d) 156. We may assume, *arguendo*, that a post exchange, as the distributor, may become liable for tax with respect to sales made by it. But this was not the situation here. The taxes here in controversy were imposed upon the Oil Company as vendor; the post exchanges were simply vendees (R. 2–5, 73, 76–77), and the legal incidence of the taxes did not fall upon them. Although the Oil Company may contend that the tax is imposed upon the vendee, the plain fact is that it is suing in its own name and on its own behalf for refund of taxes which it paid as vendor. Moreover, to the extent that California does impose any gasoline taxes upon Post Exchanges, those taxes have been paid by the Post Exchanges in accordance with the terms of the Hayden-Cartwright Act discussed in footnote 5, *infra*, p. 8.

Constitutional issue is involved it makes no difference whether a post exchange is a Federal instrumentality; a state tax upon the vendor is valid even where the purchaser is the United States itself. The Oil Company's claim to exemption upon the second ground is therefore founded solely upon the state statute which by its terms has undertaken to exempt sales to the United States "or any department thereof." Whether a post exchange is a "department" of the United States within the meaning of the California statute is purely a question of construction of the state statute,[3] as will be shown in greater detail, *infra*.

2. *This case is not properly before the Court under Section 237 (a) of the Judicial Code.*—The jurisdictional statement filed by the appellant relies upon Section 237 (a) of the Judicial Code as the basis for jurisdiction (p. 2), and Section 237 (a) provides:

> SEC. 237. (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or *where*

[3] Even a federal instrumentality such as the Tennessee Valley Authority which is equivalent to the United States in the constitutional sense may or may not be equivalent of the United States or a department thereof within the meaning of a statute. *Pierce* v. *United States*, 314 U. S. 306; cf. *United States* v. *Marxen*, 307 U. S. 200, 203. The question is one of statutory construction, and here it is one of construction of the state statute.

> *is drawn in question the validity of a statute of any State,* on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal * * * [Italics supplied.]

It is plain that these provisions are applicable here only to the extent that the state court sustained the validity of the California statute as against the contention that it was repugnant to the Constitution. But the only contention of unconstitutionality was that a state may not tax a vendor with respect to sales to the United States or its instrumentalities, and that contention does not raise a substantial Federal question. That question was unambiguously answered in *Alabama* v. *King & Boozer,* 314 U. S. at 9, and cannot form the basis for an appeal under Section 237 (a).

Moreover, it is clear that Section 237 (a) does not authorize an appeal with respect to the court's ruling on the Oil Company's contention that the sales were exempt under Section 10 of the California statute. In holding that the sales were not exempt under the statute, the California court was not sustaining the validity of a state statute; the statute was valid whether or not the exemption applied, and the court simply ruled that the exemption did not apply.

3. *This case does not involve any substantial Federal question which could support a writ of*

certiorari under Section 237 (b) of the Judicial Code.—We think it abundantly clear that neither of the two grounds relied upon by the Oil Company can form the basis for an appeal under Section 237 (a). Under Section 237 (c), however, the Court is directed to treat the appellant's papers as a petition for certiorari where the proper mode of invoking review is by a petition for certiorari. We submit that this Court could have no jurisdiction over this controversy even through certiorari.

This case comes here from a state court, and Section 237 (b) makes it plain that the writ may issue only where a Federal right is involved.[1] But as shown above, the claim that the California statute violates the Constitution of the United States does not present a substantial Federal

[1] Section 237 (b) provides as follows:

"(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. * * *"

question, and, as we shall undertake to show in greater detail, the claim to exemption under Section 10 of the California statute does not present a Federal question at all.

The exemption accorded by Section 10 of the California statute applies to sales of gasoline made "to the government of the United States or any department thereof for official use of said government." If any army post exchange is not a "department" within the meaning of Section 10, the exemption does not apply. And whether it is a "department" is solely a question of interpretation of the California statute. There is no basis whatever for injecting into this controversy the question whether a post exchange is a federal instrumentality for the purpose of determining whether a state tax imposed upon the post exchange would be valid under the Federal Constitution.[5]

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[5] Moreover, to the extent that any gasoline taxes are imposed *upon* a post exchange itself, Congress has made specific provision with respect thereto. Section 10 of the Hayden-Cartwright Act, c. 582, 49 Stat. 1519, provides that all state taxes upon sales of gasoline may be levied in the same manner and to the same extent when such sales are made by or through post exchanges or similar agencies located on United States military or other reservations, when such gasoline is not for the exclusive use of the United States. We are informed that the War Department has construed these provisions as being applicable to the military reservations in question and that under its direction, the very post exchanges here in controversy have filed returns with the State of California and have made payment of taxes upon *their* sales of gasoline during the very period here in question.

It is entirely immaterial that the California court may have considered decisions of this Court relating to intergovernmental tax immunity under the Constitution as an aid to the interpretation of the state statute. The pivotal consideration is that the relief, if any, which the Oil Company might obtain on this ground would be relief under the *state* statute, not under the Federal Constitution.

The decision in *Miller's Executors* v. *Swann*, 150 U. S. 132, is analogous. In that case a decision of the Supreme Court of Alabama had turned upon the proper construction of an Alabama statute authorizing the sale of certain lands which had been granted to Alabama by Congress "in accordance with the acts of Congress granting the same." The Alabama court had construed the federal acts, thus incorporated into the state law, as imposing a condition precedent to a sale. An appeal was taken to this Court upon the ground that the acts of Congress, properly construed, did not impose such a condition. The appeal was dismissed for lack of a federal question. The Court said (pp. 136–137):

> The question is not what rights passed to the State under the acts of Congress, but what authority the railroad company had under the statute of the State. The construction of such a statute is a matter for the state court, and its determination thereof is binding on this court. *The fact that the state statute and the mortgage*

> *refer to certain acts of Congress as prescribing the rule and measure of the rights granted by the State, does not make the determination of such rights a Federal question.* A State may prescribe the procedure in the Federal courts as the rule of practice in its own tribunals; it may authorize the disposal of its own lands in accordance with the provisions for the sale of the public lands of the United States; and in such cases an examination may be necessary of the acts of Congress, the rules of the Federal courts, and the practices of the Land Department, and yet the questions for decision would not be of a Federal character. The inquiry along Federal lines is only incidental to a determination of the local question of what the State has required and prescribed. The matter decided is one of state rule and practice. The facts by which that state rule and practice are determined may be of a Federal origin. [Italics supplied.]

A similar situation was presented in *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.*, 237 U. S. 300, in which it was suggested that jurisdiction of the writ of error might be sustained on the ground that the act of Louisiana under which appellee operated required that it comply with an act of Congress. The Court held that the writ of error could not be sustained on that basis, saying (p. 303):

> But when, as here, the foundation of the right claimed is a state law, the suit to

assert it arises under the state law none the less that the state law has attached a condition that only alien legislation can fulfill. The state law is the sole determinant of the conditions supposed, and its reference elsewhere for their fulfilment is like the reference to a document that it adopts and makes part of itself. The suit is not maintained by virtue of the Act of Congress but by virtue of the Louisiana statute that allows itself to be satisfied by that Act. See *Interstate Street Ry.* v. *Massachusetts,* 207 U. S. 79, 84.

Compare *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495, 507.

As pointed out by Mr. Justice Cardozo in *Gully* v. *First Nat. Bank,* 299 U. S. 109, 115: "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit." And, as in the *Gully* case, the instant case presents a situation where "the most one can say is that a question of federal law is lurking in the background * * *." *Id.,* p. 117.[6]

[6] The principle is also illustrated by cases in which the statute or law of one State is drawn in question in the courts of another State. Thus, in *City Bank Farmers' Trust Co.* v. *New York Central R. R. Co.,* 253 N. Y. 49, the issue was whether a transfer was taxable by the laws of Pennsylvania. The Supreme Court of Pennsylvania, in an earlier decision, had held that the Pennsylvania reciprocity provisions did not include residents of New York dying within a certain period, because the Tax Commission of New York and a New York statute had stated that the New York law did not grant a similar exemption to residents of Pennsylvania. The New York Court of Appeals, however, held the ruling

The distinction was recently made clear in *State Tax Comm'n. v. Van Cott*, 306 U. S. 511. There, the Supreme Court of Utah had held that the salary of an employee of the Reconstruction Finance Corporation was not taxable under the Utah income-tax law which exempted salaries "for services rendered in connection with the exercise of an essential governmental function." It was not clear from the opinion of the Utah court whether its ruling was based upon an interpretation of its own statute or whether it undertook to grant the exemption under the compulsion of the Federal Constitution; and these two grounds were so "interwoven" that this Court was "unable to conclude

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of the Tax Commission to be erroneous, and the statute to be unconstitutional. But, in determining the law of Pennsylvania, the court, speaking through Chief Judge Cardozo, said (p. 63):

"The judgment before us may not stand while the judgment of the Supreme Court of Pennsylvania is standing unchanged. That judgment, right or wrong, decides the whole issue. The issue is merely this: do the laws of Pennsylvania, properly interpreted, impose a tax upon the plaintiff's shares of stock in a Pennsylvania corporation? The Supreme Court of Pennsylvania has said that they do. In reaching that conclusion it has had occasion to consider the meaning and effect of the statutes of New York. What it has said in that regard does not constitute its decision. What it has said in that regard is a step in the process of reasoning leading up to the decision. In the end it has determined, not the meaning and effect of the statutes of New York, but the meaning and effect of the statutes of Pennsylvania. As to that, as we have said, its authority is final."

See also *Ingenohl* v. *Olsen & Co.*, 273 U. S. 541; *Godard* v. *Gray*, L. R. 6 Q. B. 139, 151.

that the judgment" rested "upon an independent interpretation of the state law" (306 U. S. 511, 514). Furthermore, the intervening decision in *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, showed that the state court had erroneously construed the Federal Constitution. The Court therefore remanded the case to the Supreme Court of Utah for further consideration. In taking this action, this Court adverted to the familiar rule that if the state court had been—

> only incidentally referring to decisions of this Court in determining the meaning of the state law, and had concluded therefrom that the statute was itself intended to grant exemption to respondent, this Court would have no jurisdiction to review that question. [306 U. S. 511, 514.]

In *Minnesota* v. *National Tea Co.*, 309 U. S. 551, this Court similarly refused to review a decision of the Supreme Court of Minnesota because it was not clear from the opinion of the state court whether its decision in holding a state statute invalid was grounded upon the state or federal constitution. This Court recognized the possibility that "the state court employed the decisions under the federal constitution merely as persuasive authorities for its independent interpretation of the state constitution", and said that "If that were true, we would have no jurisdiction to review" (309 U. S. 551, 556). The case was remanded to the state court in order that it might clarify its ground of decision.

The instant case follows a fortiorari from the *Van Cott* and *National Tea Co.* cases. In each of those cases the Court refused to pass upon the merits where it was not certain whether the state court had rested its decision upon federal or state grounds. There was a possibility in those cases that the decisions might have been rested exclusively upon either Federal or state grounds, and the remand permitted the state court to indicate which ground was selected as dispositive of the controversy. In the instant case, however, the state court could not possibly have rested its decision upon Federal grounds. At most, a federal question merely lurked in the background of the interpretation of section 10 of the state act, and could not constitute the operative basis for decision. Accordingly, not only should the Court refuse to pass upon the issue here just as it did in the *Van Cott* and *National Tea Co.* cases, but there may not even be any occasion for a remand to the state court for the purpose of clarifying its position. The California court could not, if it wished, rest its decision on constitutional grounds. The exemption, if any, to which the Oil Company may be entitled would be derived solely from the state statute; no principle of constitutional law could be invoked as the operative force requiring the exemption.' However, if the Court should hold that a Post Exchange is a "federal instrumental-

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'To be sharply distinguished are those cases in which federal and state questions are interwoven and where the

ity." in *Query* v. *United States*, No. 619, this case could be remanded to the California court for reconsideration of the state question, as was done in *Patterson* v. *Alabama*, 294 U. S. 600, 607.

Nor is any federal question raised in this case by reason of the Act of October 9, 1940, c. 787, 54 Stat. 1059, which undertakes to permit states to levy taxes within areas that are otherwise subject to the exclusive territorial jurisdiction of the United States. That statute simply extends the territorial jurisdiction of the states to embrace

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state court's decision rests upon what it conceives to be the "compulsion of federal law." See *Breisch* v. *Central R. R. of N. J.*, 312 U. S. 484, 489. See also *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 120; *Tipton* v. *Atchison Ry. Co.*, 298 U. S. 141, 151–152. In that situation this Court has felt free to reexamine the state court's ruling. But it will be observed that in the instant case no provision of federal law has any compelling effect whatever upon the interpretation of the state statute. The State could have granted or withheld the exemption at will, and whatever aid the California court may have sought from the decisions of this Court in construing the exemption certainly cannot be treated as the equivalent of that "compulsion of federal law" referred to in the *Breisch* decision.

Moreover, it should also be kept in mind that the issue in the *Breisch* case was not whether there was a federal question within the meaning of Section 237 (a) or (b) of the Judicial Code. That case came to the federal courts through diversity of citizenship, and the existence of a federal question was not a necessary condition to jurisdiction. The issue in that case related to the extent to which a federal court would be bound by state court decisions. Although the issues appear to be superficially similar, it is by no means clear that the same criteria are controlling in determining the existence of a federal question for the purpose of marking out the limits of this Court's appellate jurisdiction within the meaning of Section 237.

areas not theretofore within their taxing power. None of the areas in this case (R. 2), however, is within the exclusive jurisdiction of the United States, so that there can be no question whatever as to the application or interpretation of the Act of October 9, 1940.

CONCLUSION

This case is not properly before the Court under Section 237 (a) of the Judicial Code, and there is not presented any federal question that could support a writ of certiorari under Section 237 (b). The case should be dismissed. However, if the Court should hold that a Post Exchange is a "federal instrumentality" in the constitutional sense in *Query* v. *United States*, No. 619, the Court might properly remand this case for reconsideration of the state question as was done in *Patterson* v. *Alabama*, 294 U. S. 600, 607.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
ARNOLD RAUM,
ALVIN J. ROCKWELL,
Special Assistants to the Attorney General.
MAJOR GENERAL MYRON C. CRAMER,
The Judge Advocate General.
FRED W. LLEWELLYN,
Colonel, Judge Advocate General's Department.

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U. S. GOVERNMENT PRINTING OFFICE: 1942

SUPREME COURT OF THE UNITED STATES.

No. 1125.—October Term, 1941.

Standard Oil Company of California, Appellant, *vs.* Charles G. Johnson, as Treasurer of the State of California.	On Appeal from the Supreme Court of the State of California.

[June 1, 1942.]

Mr. Justice Black delivered the opinion of the Court.

The California Motor Vehicle Fuel License Tax Act[1] imposes a license tax, measured by gallonage, on the privilege of distributing any motor vehicle fuel. Section 10 states that the Act is inapplicable "to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government." The appellant, a "distribtuor"[2] within the meaning of the Act, sold gasoline to the United States Army Post Exchanges in California. The State levied a tax, and the appellant paid it under protest. The appellant then filed this suit in the Superior Court of Sacramento County seeking to recover the payment on two grounds: (1) that sales to the Exchanges were exempt from tax under Section 10; (2) that if construed and applied to require payment of the tax on such sales the Act would impose a burden upon instrumentalities or agencies of the United States contrary to the federal constitution. Holding against the appellant on both grounds, the trial court rendered judgment for the State. The Supreme Court of California affirmed. 19 Adv. Cal. Rep. 125. Since validity of the State statute as construed was drawn in question on the ground of its being repugnant to the Constitution, we think the case is properly here on appeal under Section 237(a) of the Judicial Code.

[1] Cal. Stats. 1923, pp. 572, 573, 574; 1927, p. 1309; 1933, pp. 1636, 1637; 1937, p. 2219.

[2] Section 7 of the Act provides: "For the purpose of this act all motor vehicle fuel sold, donated, consigned for sale, bartered or used shall be deemed to be distributed. . . ."

Since Section 10 of the California Act made the tax inapplicable "to any motor vehicle fuel sold to the government of the United States or any department thereof", it was necessary for the Supreme Court of California to determine whether the language of this exemption included sales to post exchanges. If the court's construction of Section 10 of the Act had been based purely on local law, this construction would have been conclusive, and we should have to determine whether the statute so construed and applied is repugnant to the federal constitution. But in deciding that post exchanges were not "the government of the United States or any department thereof", the court did not rely upon the law of California. On the contrary, it relied upon its determination concerning the relationship between post exchanges and the government of the United States, a relationship which is controlled by federal law. For post exchanges operate under regulations of the Secretary of War pursuant to federal authority. These regulations and the practices under them establish the relationship between the post exchange and the United States government, and together with the relevant statutory and constitutional provisions from which they derive, afford the data upon which the legal status of the post exchange may be determined. It was upon a determination of a federal question, therefore, that the Supreme Court of California rested its conclusion that, by Section 10, sales to post exchange were not exempted from the tax. Since this determination of a federal question was by a state court, we are not bound by it. We proceed to consider whether it is correct.

On July 25, 1895, the Secretary of War, under authority of Congressional enactments[3] promulgated regulations providing for the establishment of post exchanges.[4] These regulations have since been amended from time to time and the exchange has become a regular feature of Army posts. That the establishment and control of post exchanges have been in accordance with regulations rather than specific statutory directions does not alter their status, for authorized War Department regulations have the force of law.[5]

Congressional recognition that the activities of post exchanges

[3] 16 Stat. 315, 319; 18 Stat. 337.

[4] G. O. 46, Hdqrs. of the Army.

[5] United States v. Eliason, 16 Pet. 291, 302; Gratiot v. United States, 4 How. 80, 117-118.

are governmental has been frequent. Since 1903,[6] Congress has repeatedly made substantial appropriations to be expended under the direction of the Secretary of War for construction, equipment, and maintenance of suitable buildings for post exchanges. In 1933 and 1934, Congress ordered certain moneys derived from disbanded exchanges to be handed over to the Federal Treasury.[7] And in 1936, Congress gave consent to state taxation of gasoline sold by or through post exchanges, when the gasoline was not for the exclusive use of the United States.[8]

The commanding officer of an Army Post, subject to the regulations and the commands of his own superior officers, has complete authority to establish and maintain an exchange. He details a post exchange officer to manage its affairs. This officer and the commanding officers of the various company units make up a council which supervises exchange activities. None of these officers receives any compensation other than his regular salary. The object of the exchanges is to provide convenient and reliable sources where soldiers can obtain their ordinary needs at the lowest possible prices. Soldiers, their families, and civilians employed on military posts here and abroad can buy at exchanges. The government assumes none of the financial obligations of the exchange. But government officers, under government regulations, handle and are responsible for all funds of the exchange which are obtained from the companies or detachments composing its membership. Profits, if any, do not go to individuals. They are used to improve the soldiers' mess, to provide various types of recreation, and in general to add to the pleasure and comfort of the troops.

From all of this, we conclude that post exchanges as now operated, are arms of the government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it, and partake of whatever immunities it may have under the constitution and federal statutes. In concluding otherwise the Supreme Court of California was in error.

Whether the California Supreme Court would have construed the Motor Vehicle Fuel License Act as applicable to post exchanges

[6] 32 Stat. 927, 938.

[7] 47 Stat. 1571; 1573; 48 Stat. 1224, 1229. See Hearings, House, War Department Appropriation Bill, 1934, 72d Cong., 2d Sess., 648.

[8] 49 Stat. 1519, 1521, amended by 54 Stat. 1059, 1060-1061.

if it had decided the issue of legal status of post exchanges in accordance with this opinion, we have no way of knowing. Hence, a determination here of the constitutionality of such an application of the Act is not called for by the state of the record. Cf. *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 557. Accordingly, we reverse the judgment and remand the cause to the court below for further proceedings not inconsistent with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.